IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITON NO.98 OF 1985

Subhash Roshanlal Aggarwal. ...Petitioner.

vs.

Bihar Paper Mills Ltd. ...Respondent.

Mr.M.L.Bansal, for Petitioner.

None for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 14th November,2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the sole Arbitrator dated 8.6.1985. Before me the Award is challenged only to the extent that the amount of Rs.4,71,100/- has been awarded as per Clause (9) of the Agreement. The agreement between the parties was for transport of goods. The admitted position is that the goods were not at all transported. Clause (9) of the Agreement under which the amount of Rs.4,71,100/- has been awarded, reads as under:-

"9. The second party shall ensure that the above

consignments of second hand paper machine and other accessories reach the godown of the First Party within maximum period of 20 days from the date of delivery of consignment at Bombay Seaport failing which a penalty @½% of total value of contract per day will be charges by the First Party for each day delay."

It is clear that the maximum period of 20 days is allowed for transporting the goods. If there is any delay in transporting the goods, amount of penalty is indicated in clause (9). The relevant portion of the Award which is impugned, reads as under:-

41(D) Penalty for non-delivery of the goods within 20 days from the date of delivery at the rate of ½% of the total contract cost per day as per Clause 9 of the agreement dated 3.8.82 plus 20 days i.e. 15.10.82 till 7.3.83 (the time allowed to the New Contractor to start the job) i.e., 140 days Rs.3,365/- per day. Calculated at ½% of the Contract value of Rs.6.73 lakhs.	....Rs. 4,71,100/-	The amount is allowed in full i.e. Rs.4,71,100/- as the consignment which were to be delivered by the Carrier Corporation to the Paper Mills were not delivered as per the terms and the finding being that the Carrier Corporation were at fault and hence as per Clause 9 of the Agreement for every day of delay ½% of the Contract amount is payable to the

Paper Mills.

Section 74 of the Indian Contract Act lays down that if in the Contract a sum is named as penalty then what can be awarded to the party is reasonable compensation. The penalty indicated in the contract is the maximum amount that can be awarded. Section 74 of the Indian Contract Act reads as under:-

> "74. Compensation for breach of contract where penalty stipulated for.- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named or, as the case may be, penalty stipulated for."

It therefore follows that a party who is claiming compensation will have to lead evidence to show what would be the amount of

reasonable compensation. The amount which is indicated in the contract as penalty cannot be claimed straight away by the party. Perusal of the Award which is quoted above shows that the learned Arbitrator has not considered the provisions of Section 74 of the Indian Contract Act while making the Award. The Award therefore, clearly suffers from non application of mind. Therefore, the Award impugned in the petition in so far as the amount awarded of Rs.4,71,100/- under clause (9) of the Contract, is liable to be set aside. It is accordingly, set aside. The Award impugned in the petition is modified to that extent. The petition is disposed of.